OCT 30 1972
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-662

JAN T. BATA, Individually and as Representative of the Estate of Jan A. Bata, Deceased

Petitioner

v.

THOMAS J. BATA

and

CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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October 30, 1972

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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v

THOMAS J. BATA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

The petitioner, Jan T. Bata, Individually and as Representative of the Estate of Jan A. Bata, Deceased, prays that a Writ of Certiorari issue to review the Opinion and Judgment of the Supreme Court of the Commonwealth of Pennsylvania rendered in these proceedings on June 28, 1972, Petition for Reargument denied on August 4, 1972.

OPINIONS BELOW.

The Opinion of the Supreme Court of Pennsylvania is reported in 448 Pa. 385, 293 A. 2d 343 (1972) and ap-

pears at Appendix A pp. 1b to 26b. The Opinions and Decrees of the Court of Common Pleas are unreported. The Opinion and Decree of the Court of Common Pleas of February 3, 1970 appears in Appendix A pp. 27b. to 35b. The Opinion of October 5, 1971 appears in Appendix A pp. 36b to 47b, and the Supplementary Decree appears at Appendix A pp. 47b to 49b.

JURISDICTION

The Order or Judgment of the Supreme Court of Pennsylvania was entered on June 28, 1972 and Reargument was denied on August 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

The Supreme Court of Pennsylvania affirmed, Justice Egan dissenting, the Supplementary Decree of the Court of Common Pleas of October 5, 1971.

The question arising thereby is:

> Whether the decision of the Supreme Court of Pennsylvania affirming the Supplementary Decree of the Court of Common Pleas; which Decree was entered through a summary procedure denying Petitioner, a citizen of Brazil, the right to present evidence, and denying Petitioner the right of discovery upon Appellee, and which Supplementary Decree was based essentially upon an amendment to the original Complaint of Appellee-Plaintiff made on March 16, 1970, five years after Respondent-Plaintiff had judgment on the pleadings on his original Complaint, the Court having ruled in the Order of February 3, 1970 that this further enforcement was outside the scope of the action, and made through a rule issued *ex parte* and made absolute in a summary session in which the Court of Common Pleas denied Petitioner the right to present evidence and denied

Petitioner the right to discovery upon Respondent-Plaintiff, said Supplementary Decree permanently enjoining Petitioner from seeking judicial relief "in any court of any nation"; constituted a violation of the Petitioner's right of due process under the Fourteenth Amendment of the Constitution of the United States, as affirmed under the Status of Aliens Treaty and the Friendship and Commerce Treaty between the United States and Brazil, and is in conflict with the decisions of this Court on the right of due process in state courts.

CONSTITUTIONAL PROVISIONS AND TREATIES.

The XIV Amendment of the Constitution of the United States provides in part in Section 1:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Status of Aliens Treaty (Treaty Series No. 815) between inter alia the United States and Brazil, proclaimed June 6, 1930 provides in part:

> "Article 5. States should extend to foreigners, domiciled or in transit through their territory, all individual guaranties extended to their own nationals, and the enjoyment of essential civil rights without detriment, as regards foreigners, to legal provisions governing the scope and usages for the exercise of said rights and guaranties."

The Treaty of Friendship Commerce and Navigation proclaimed March 18, 1829 (Treaty Series No. 34) provides in part:

"Art. 12th. Both the contracting parties promise and engage formally to give their special protection to the persons and property of the citizens and subjects of each other, of all occupations who may be in their territories, subject to the jurisdiction of the one or the other, transient or dwelling therein, leaving open and free to them the tribunals of justice for their judicial intercourse, on the same terms which are usual and customary, with the natives or citizens and subjects of the country in which they may be; . . ."

STATEMENT OF THE CASE

The Supplementary Decree of the Court of Common Pleas permanently enjoining the Petitioner from seeking judicial relief "in any court of any nation" Appendix A p. 49b para 5 and the entire Supplementary Decree, is a climactic event in a tragic twenty-five year attack launched by Respondent, in control of the five hundred million dollar worldwide Bata family industrial and financial empire, against the Petitioner and his deceased father, members of the same Moravian family, shoemakers for three hundred years with no known family litigation throughout the centuries until Respondent began his attack.

The attack took advantage of the lack of Czechoslovakian records, and of Respondent's control of vast resources, utilized a multiple number of large and prestigious law firms around the world, falsely arrested the Deceased Jan A. Bata, as held by the New York Court of Appeals, (302 N.Y. 213, 97 N.E. 2d 757, (1951) held him in jail for 21 days, broke his health, drove him into insolvency, and conducted an incredibly cruel and oppressive assault upon him, circumvented a Decision in favor of the Petitioner by the Supreme Court of the Netherlands at The Hague in an action brought by Respondent in that country, and, in his view, coerced him into signing in 1962 more than one hundred documents, including

an escrow agreement at Central-Penn National Bank in Philadelphia.

In recent years, as relations between East and West improved, the Petitioner has begun to obtain documents from Czechoslovakia which substantiate clearly the rights of his branch of the famous Bata family, and expose the false and fraudulent actions of the Respondent in his attacks; and Petitioner has learned that the Respondent had surreptitiously paid $100,000 to the Czechoslovakian authorities in 1962 to block the Deceased Jan A. Bata from obtaining records; and discovered that Respondent had presented a crucial false fabricated document to the New York Supreme Court and to the Swiss Courts, in his first attack in 1947.

Respondent met these developments with intensified attacks, including a "Petition for Further Enforcement" filed on March 25, 1969 in the Court of Common Pleas of Philadelphia, which sought an Order permanently enjoining the Petitioner from seeking judicial relief anywhere in the world.

After a vigorous and intensive year-long contest over this "Petition for Further Enforcement", Petitioner won a clear decision against this Petition for Further Enforcement in the Order of February 3, 1970, holding that this Petition was outside the scope of the original Complaint and outside the scope of the original Decree on the escrow matter, and that "Plaintiff's remedy is in some other action, separate and independent from this one: "Appendix A page 31b line 12.

Immediately after the entry of this Decision, on February 11, 1970, the Respondent obtained *ex parte* a Rule upon Petitioner to Show Cause Why the Original Complaint should not be amended to include new averments and to request the relief denied in the February 3, 1970 Order. (Rule issued under local practice.)

On the return day of this Rule the Court of Common Pleas denied all requests of the Petitioner for leave to

present evidence in opposition to the Rule; overruled the specific objection of violation of due process under the Constitution of the United States as affirmed in the Treaties between Brazil and the United States; continued in force a protective Order which had prohibited the Petitioner from ever having discovery upon the Respondent-Plaintiff; and summarily made the Rule absolute permitting Respondent to amend his Complaint, which he then did.

Thereafter, in summary proceedings, the Court of Common Pleas overruled the contention of Petitioner that the amendment of the original Complaint inherently reopened the proceedings and thus set aside all intervening proceedings, denied the Petitioner the right to present evidence and denied Petitioner the right of discovery, overruled the due process pleas, and objections of Respondent, and entered the Supplementary Decree of October 5, 1971. Appendix A pp. 47b to 49b.

DUE PROCESS ISSUE RAISED IN THE COURTS BELOW.

The Petitioner raised the issue of Due Process and Treaty Rights directly in the Court of Common Pleas, including

> ". . . would deprive defendant of his rights and property without due process of law and in violation of the due process clause of the Constitution of the United States and in violation of the Treaties of Friendship and Commerce between the United States and Brazil." R. 1163 d

Petitioner was overruled by said Court.

The Petitioner raised the issue in the Supreme Court of Pennsylvania in his appeals, including his appeal as to the Supplementary Decree. His Supplementary Brief in reference thereto including the following:

"Have the appellant's rights of due process under the Fourteenth Amendment of the Constitution of the United States been violated by the summary order and decree of October 5, 1971, in the total context of the proceedings herein, which prevented appellant from ever having pretrial discovery or ever questioning appellee, or ever having a trial upon the merits?"

The Supreme Court of Pennsylvania avoided this issue in its Opinion in what appeared to be an endeavor to frustrate review by this Court.

The issue was raised again in the Petition for Reargument, which was denied per curiam.

REASONS FOR GRANTING THE WRIT.

The Decision of the Supreme Court of Pennsylvania is in clear conflict with the requirements of due process as set forth in the decisions of this Court:

Murray's Lessee v. *Hoboken Land and Improvement Company*, 59 U.S. 272, 280 (18 How.), 15. L. Ed. 372, 376 (1855)

Morgan v. *United States*, 304 U.S. 1, 18, 20, 58 S. Ct. 773, 776, 777, 82 L. Ed. 1129, 1132, 1133 (1938)

Hagar v. *Reclamation District No. 108*, 111 U.S. 701, 708, 4 S. Ct. 663, 667, 28 L. Ed. 569, 572 (1884)

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Holt v. *Virginia*, 381 U.S. 131, 136, 85 S. Ct. 1375, 1378, 14 L. Ed. 2d 290, 293 (1965)

A permanent injunction issued in a State Court of Common Pleas against seeking judicial relief "in any court in any nation" in itself inherently raises a serious question of due process, and when issued as a summary Supplementary Decree in a proceeding which denies the

enjoined party the right to present evidence and denies the enjoined party the right of discovery against the opposing party, and is based upon an amendment of a Complaint, upon which judgment on the pleadings had been entered without respect for the inherent reopening of the proceeding as a result of the amendment, all together constitute a clear, definite, basic violation of the right of due process under the Fourteenth Amendment of the Constitution and under the decisions of this Court.

Only the issuance of the Writ by this Court can prevent this basic violation of due process by the State Courts, and only the preservation of the right of due process can prevent irreparable loss to Petitioner and a harsh, inequitable, unconscionable result which will adversely affect not only this Petitioner, but all who endeavor in State Courts to legally and equitably defend themselves against immense concentrated economic and fiancial power engaged in oppression of the rights of the weak and the handicapped.

CONCLUSION.

It is respectfully petitioned that the application for a Writ of Certiorari to the Supreme Court of Pennsylvania be granted.

/s/ HAROLD E. STASSEN
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/s/ JOSEPH N. BONGIOVANNI, JR.
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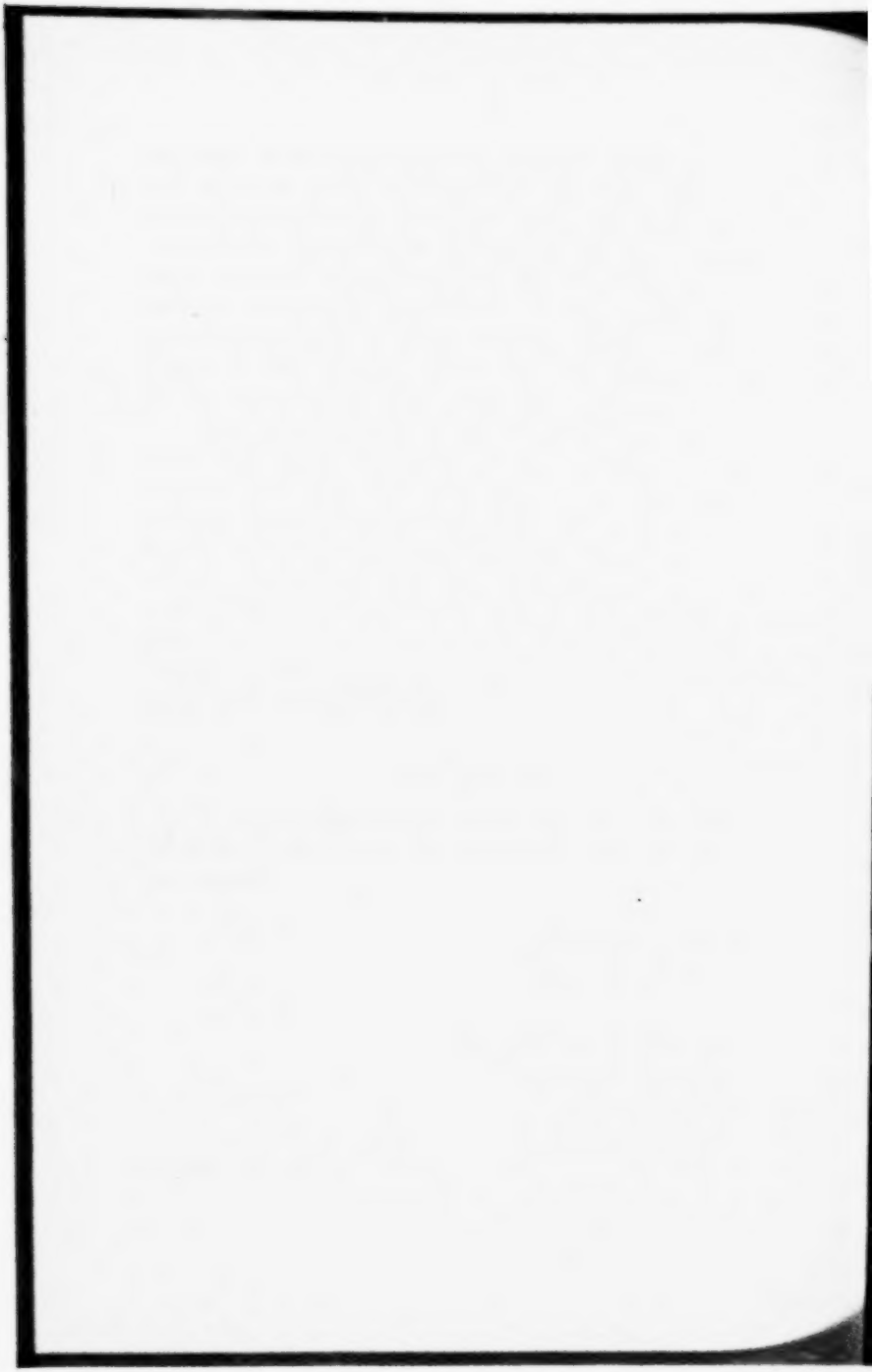
October 30, 1972



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APPENDIX A To PETITION FOR WRIT OF CERTIORARI

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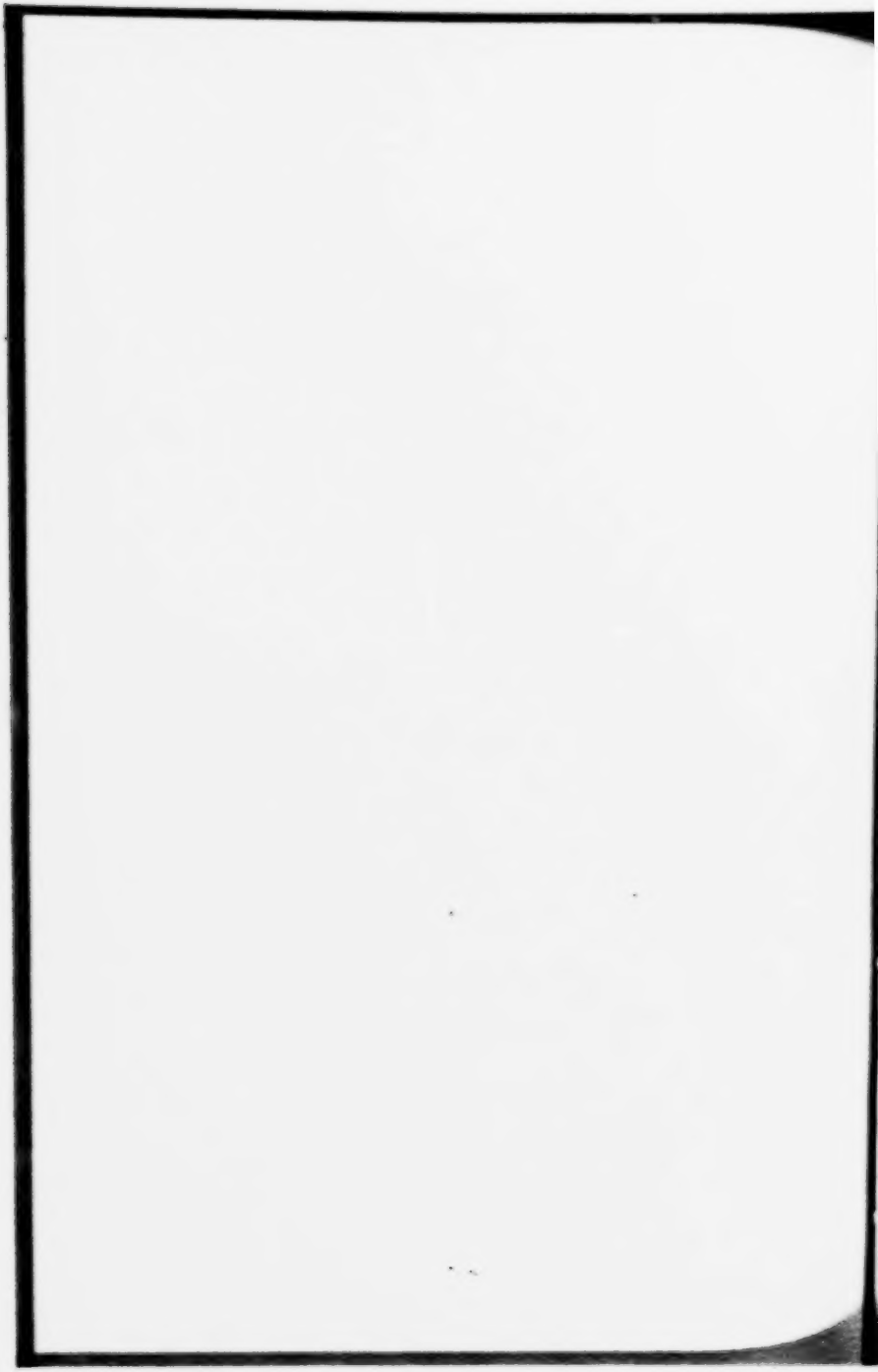
Entered on June 28, 1972
(Reargument denied Per Curiam August 4, 1972)
(Reported in 448 Pa. 355, 293A. 2d 343 (1972))

The Opinion and Order of the Court of Common Pleas of February 3, 1970

The Opinion of the Court of Common Pleas of October 5, 1971

The Supplementary Decree of the Court of Common Pleas of October 5, 1971

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA



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APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

THOMAS J. BATA *v.* CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA AND JAN T. BATA, INDIVIDUALLY and as Representative of JAN A. BATA, Deceased,

Appellant

No. 491 JANUARY TERM, 1970
No. 135 JANUARY TERM, 1972

APPEAL FROM DECREE, DATED FEBRUARY 3, 1970, OF THE COURT OF COMMON PLEAS No. 3 OF PHILADELPHIA, No. 2495, JUNE TERM, 1963

(CONSOLIDATED WITH)

APPEAL FROM SUPPLEMENTARY DECREE, DATED OCTOBER 5, 1971, OF THE COURT OF COMMON PLEAS No. 3 OF PHILADELPHIA, No. 2495, JUNE TERM, 1963

OPINION OF THE COURT

ROBERTS, *J.* Filed: June 28, 1972

We have consolidated for consideration appellant Jan T. Bata's appeal from a February 3, 1970, decree of the Philadelphia Common Pleas Court (No. 491 January Term, 1970) and appellant's appeal from a supplementary decree of that same common pleas court entered October 5, 1971 (No. 135 January Term, 1972).

These appeals represent the latest chapter in a twenty-five dispute over control of the worldwide network of Bata enterprises. This dispute was purportedly terminated by a settlement agreement in 1962, but since 1963 the courts of this Commonwealth have been occupied almost continuously with litigation centering around the settlement agreement. In fact, on two prior occasions this

Court has written full opinions on various aspects of the litigation concerning the settlement agreement. *Bata* v. *Central-Penn National Bank of Philadelphia*, 433 Pa. 284, 249 A. 2d 767 (1969) [hereinafter cited as Bata II]; *Bata* v. *Central-Penn National Bank of Philadelphia*, 423 Pa. 373, 224 A. 2d 174 (1966) [hereinafter cited as Bata I].

The litigation in the courts of this Commonwealth, as we shall describe in detail, has been generated by appellant's patent violations of the 1962 settlement agreement and protracted by appellant's open defiance of the decrees of the courts of this Commonwealth. The decrees from which appellant now appeals awarded appellee compensatory damages for the injuries he suffered as a result of appellant's numerous breaches of the settlement agreement and as a result of appellant's contempt of the decrees of the trial court. The decrees from which appellant now appeals also enjoined appellant from any further violations of the settlement agreement. We find no error in the trial court's decree of February 3, 1970, nor in its supplementary decree of October 5, 1971. Accordingly we affirm.

I

The factual background of these appeals is a lengthy and complicated one:

A. The 1962 Settlement Agreement

"On March 27, 1962, [appellee] Thomas J. Bata and the late Jan A. Bata[1] executed a settlement agreement

1 "The genesis of this controversy actually dates back to the 1932 death of Thomas Bata, a citizen of Czechoslovakia, who was survived by his widow, a son, Thomas J. Bata, the present appellee, and a half-brother, the late Jan A. Bata, the present appellant. During his life Thomas Bata had immensely expanded the family's shoe business into an international enterprise which at the time of his death was worth between $30,000,000 and $45,000,000. *Bata* v. *Bata*, 163 A. 2d 493, 496 (Del. 1960); *Bata* v. *Bata*, 306 N. Y. 96, 99, 115 N. E. 2d 672, 673 (1953). In order to avoid taxes, the profits from the foreign corporations were accumulated in foreign banks and the records documenting the expansion of Bata's wealth were concealed. For reasons peculiar to Czechoslovakian inheritance law, which would permit his estate to escape heavy taxation, Jan A. Bata, with the consent and knowledge of Thomas J. Bata, assumed title to his

purporting to terminate fifteen years of almost continuous litigation. The agreement provided that the parties would exchange stock certificates and instruments of assignment in various Bata companies, that they would execute comprehensive general releases as well as some 150 special releases, and that they would terminate each of the thirteen lawsuits then pending between them. In addition, [appellee] Thomas J. Bata agreed to pay Jan the sum of $3,400,000. . . ." *Bata I* at 375-76, 224 A. 2d at 177-78.

Two particular portions of this 1962 settlement agreement should be noted. First, as a part of the comprehensive settlement agreement, appellant agreed to cooperate in terminating an action then pending in the Chancery Division of the High Court of Justice of England [hereinafter referred to as the English action] by the entry of an agreed form of "Tomlin Order." This English action involved the conflicting claims of appellant and appellee to certain corporate shares and the accumulated dividends thereon.

Second, by a document dated March 14, 1962, which was incorporated as a part of the comprehensive settlement agreement, appellee and appellant entered into certain agreements concerning N. V. Nederlandsche Schoenen-Lederfabrieken Bata-Best, a Dutch corporation [here-

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half-brother's enterprises under a fictitious prior oral contract of sale. *Bata* v. *Bata*, 163 A. 2d 493, 497, 517 (Del. 1960); *Bata* v. *Bata*, 306 N. Y. 96, 104-07, 115 N.E. 2d 672, 675-77 (1953).

"For several years all went well and the business continued to thrive as a family concern. However, around the outbreak of the Second World War, friction developed between Thomas J. and Jan, which eventually led to conflicting claims of legal ownership. In 1947 the first suit was filed in Switzerland by the present appellee; the parties have been engaged in almost constant litigation since. During this period the courts of Switzerland, the Netherlands, England, New York, and Delaware, among others, have considered various aspects of this controversy. A more complete history of the dispute will be found in the recorded opinions of the New York and Delaware courts, *Bata* v. *Hill*, 139 A. 2d 159 (Del. Ch. 1958) aff'd sub nom. *Bata* v. *Bata*, 163 A. 2d 493 (Del. 1960), reargument denied, 170 A. 2d 711 (Del.), cert. denied, 366 U.S. 964 (1961); *Bata* v. *Chase Safe Deposit Co.*, 99 N.Y.S. 2d 535 (1950), aff'd sub nom. *Bata* v. *Bata*, 279 App. Div. 182, 108 N.Y.S. 2d 659 (1951), aff'd 306 N. Y. 96, 115 N.E. 2d 672 (1953)."

Bata I at 375-76 n. 1, 224 A. 2d at 177-78 n. 1.

inafter referred to as Bata-Best]. By this document it was agreed, inter alie, that:

"*Article IV*

The accumulated earned surplus in Bata-Best shall be capitalized and additional shares shall be issued therefor to the holders of shares of Bata-Best in proportion to their share ownership, which is recognized to be 55% in Leader A.G. and 45% in (appellant) Jan A. Bata . . .([2])

". . . .

"*Article VI*

The shares of Bata-Best shall be changed to registered shares and these registered shares, in all other respects the same as present bearer shares, shall be issued to the holders of the present bearer shares in exchange therefor. . . .

". . . .

"*Article VII*

Recognizing the importance of the harmonious operations of Bata-Best, (appellant) Jan A. Bata undertakes that he will not commence or take part as a party in any law suit concerning any affairs of Bata-Best . . . ."

In order to guarantee the performance of appellant's agreements to cooperate in terminating the English action and to cooperate in registering the shares of Bata-Best, an escrow arrangement was established as a part of the

[2] Appellant's recognition in the March 14, 1962, document that he owned only 45% of the Bata-Best stock and that Leader A. G., a Swiss company, owned 55%, was in fact a concession that appellee owned 55% of Bata-Best. Leader A. G. was controlled by a Swiss partnership, and the Swiss courts had held that this partnership was obligated to act in accordance with the instructions of appellee. In the 1962 settlement agreement, appellant expressly disclaimed any "legal or beneficial interest whatever in Leader A. G. or in its assets," and also waived "any and all interest" in the Swiss partnership.

comprehensive settlement agreement. According to this escrow arrangement appellee deposited $500,000 of the $3,400,000 that he had agreed to pay appellant with the Central-Penn National Bank of Philadelphia (hereinafter referred to as Central-Penn). Appellant deposited certain stock certificates and other documents with the same institution. It was agreed that the $500,000 would be delivered to appellant and the stock certificates and other documents would be delivered to appellee upon the termination of the English action and the registration of the Bata-Best shares.

Appellee's 1963 Action For Specific Performance of The Settlement Agreement and the Final Decree of 1965

By mid 1963, despite his undertakings in the comprehensive settlement agreement, appellant had not cooperated in terminating the English action nor had he cooperated in effecting the registration of the Bata-Best shares. Accordingly, on July 16, 1963, appellee filed a complaint in equity alleging that: "Defendant [appellant] Jan A. Bata has wrongfully refused to cooperate in obtaining an order of the High Court of Justice in London to conclude the litigation pending in that Court and to take the steps which are necessary to be taken by him to permit the registration of the bearer shares of the Dutch Bata Company." Appellee prayed that Central-Penn be directed to deliver the stock certificates and the other documents which it held in escrow to appellee and requested "such other, further and different relief as to the Court may seem just and equitable, together with the costs and disbursements of this action."

Appellant filed an answer alleging in new matter that the settlement agreement was void because it was entered into without consideration and was the result of duress and the force of adverse judgments which were fraudently obtained in other jurisdictions.

After extensive pleading, including a reply and a counter reply, appellee moved for judgment on the pleadings. On September 9, 1965, Judge Alessandroni entered judgment on the pleadings in favor of appellee, completely rejecting appellant's[2] claims of lack of consideration, duress, and fraud. The trial court's final decree of October 18, 1965, [hereinafter referred to as the Final Decree] specified:

"The Settlement Agreement concluded between the parties on March 27, 1962 is valid and binding. Defendant (appellant) Jan T. Bata, Executor, is ordered specifically

> a. To cooperate in terminating the action pending in England . . . by consenting to the entry of an order in the form of the attached 'Tomlin Order' in accordance with his instructions heretofore given under date of March 27, 1962 to his English Solicitors . . . ; and
>
> b. To cooperate in the registration of the outstanding bearer shares of the Dutch Bata (corporation). . . . in accordance with the agreements dated March 14, 1962 among Thomas J. Bata, Jan A. Bata and Leader, A. G."

In addition the Final Decree directed Central-Penn to deliver the stock certificates and the other documents which it held in escrow to appellee, and to retain the $500,000 which it held in escrow "pending the further order of this court, which hereby retains jurisdiction to supervise the carrying out of the provisions of this judgment."

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[2] The original defendant Jan A. Bata actually died on August 23, 1965, and his son Jan T. Bata was substituted as defendant both individually, as the successor to this father, and as representative of the estate of his deceased father. See *Bata I* at 377-78 n. 3, 224 A. 2d at 178 n. 3. Throughout this opinion we shall refer to both Jan A. Bata and Jan T. Bata interchangeably as "appellant."

Appellant perfected an appeal to this Court, and on November 15, 1966, we unanimously affirmed the Final Decree. *Bata I*. We noted:

> "Despite the 1962 settlement agreement, appellant has persisted in advancing his claim to control of the Bata Enterprises. Settlement agreements are designed to forestall not foster litigation, and while like any other contract, there are circumstances under which they may be avoided, these circumstances do not include thinly veiled averments of fraud and duress, whose purpose is to conceal disappointment with the settlement. . . . The orderly administration of justice requires that the protracted litigation which culminated in a total settlement by the parties now be deemed concluded."[4]

On April 17, 1967, the United States Supreme Court denied appellant's request for certiorari to review this Court's decision affirming the Final Decree.[5] Yet the "protracted litigation" was far from concluded.

C. Appellant's Contempt of the Final Decree

Despite this Court's affirmance of the Final Decree, appellant persisted in his refusal to cooperate in terminating the English action. Accordingly, on June 20, 1967, after a hearing, the trial court, issued a supplementary order directing appellant to take all necessary steps to procure the termination of the English action by July 31, 1967, or be fined $100,000 for contempt. Yet by August 10, 1967, appellant had not complied with the direction of the Final Decree and the supplementary order of June 20, 1967. Consequently the trial court, after a hearing, imposed a $100,000 fine upon appellant for his contempt.

By August 29, 1967, appellant had still failed to take the steps necessary for the termination of the English

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[4] *Bata I* at 386-87, 224 A. 2d at 182-83.

[5] *Bata* v. *Central-Penn National Bank of Philadelphia*, 386 U.S. 1007, 87 S. Ct. 1348 (1967).

action, and the trial court issued another supplementary order directing appellant to cooperate in terminating the English action. By November 17, 1967, appellant had still failed to comply, and after another hearing the trial court imposed an additional fine of $150,000 upon appellant for his contempt.

As late as March 7, 1968, the trial court found that appellant had still not carried out his obligation to take the steps necessary to terminate the English action. The court noted:

> "The fines aggregating $250,000 imposed upon defendant . . . are imposed by way of civil contempt in vindication of the plaintiff's established rights. The Court retains jurisdiction of the parties and of the cause to continue supervision of the carrying out of the Final Decree of October 18, 1965, and in the event of defendant's ultimate compliance with the Decree he may apply for remission of the fines imposed against him subject to plaintiff's right of damages including all expenses and attorney fees."

Throughout this period appellant also ignored the second half of the Final Decree by refusing to offer his shares for registration.

Appellant pursued another appeal to this Court from the trial court's orders imposing the fines for contempt. On February 10, 1969, this Court in *Bata II* affirmed the trial court's orders imposing the conditional fines. We described the record below as one that "for literally volumes sets out the distain with which the decrees and orders of the courts of this Commonwealth were treated."[6] We concluded that in light of "appellant's continuing course of defiance . . . there was little that the court below could do other than to issue its contempt order. There

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[6] *Bata II* at 288, 249 A. 2d at 769.

certainly can be no doubt that the order was completely within the court's discretion."[7]

D. The Trial Court's Order of February 3, 1970

Subsequent to this Court's decision in *Bata II*, appellee filed a motion entitled "Petition for Further Enforcement of the Final Decree of October 18, 1965." In this petition appellee described a series of breaches of the comprehensive settlement agreement which appellant had committed subsequent to September 9, 1965, the date that the trial court entered the adjudication which was the basis of its Final Decree. These breaches were the result of appellant's disregard of his agreements concerning the control and operation of Bata-Best. These agreements were specifically contained in the document dated March 14, 1962, which was included as a part of the comprehensive settlement agreement,[8] and appellee requested that appellant be enjoined from continuing these breaches.

First, appellee described how beginning on October 4, 1965, appellant, acting through his Swiss counsel, made extensive efforts to reopen certain litigation which had been conducted in the Swiss courts and had been concluded prior to the settlement agreement.[9] In this litigation appellant had sought to establish that a mandate or control relationship existed between himself and a Swiss partnership which through its control of Leader A. G. controlled the majority interest in Bata-Best. The Swiss courts denied appellant's claim and instead held that the

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[7] Id. at 289, 249 A. 2d at 769.

[8] See text at pages 3-4, supra.

[9] Appellant filed two motions, one in the District Court of Zurich and one in the Superior Court of Zurich, to reopen two actions which had been concluded prior to the settlement agreement. The motion in the District Court was held in abeyance while appellant appealed the Superior Court's denial of his motion to reopen to the Supreme Court of Zurich. Later appellant appealed from the Supreme Court's denial of his petition to reopen to the Swiss Federal Court (Public Law Section). Appellant also filed a separate appeal from the decision of the Superior Court of Zurich to the Swiss Federal Court (Civil Law Section).

Swiss partnership was to act in accordance with the instructions of appellee.

By his efforts to reopen the Swiss litigation, appellant contravened his express waiver in the settlement agreement of "any and all interest" in the Swiss partnership. In addition since the purpose of appellant's attempts to reopen the Swiss litigation was to secure control of Bata-Best,[10] appellant was also violating his undertaking in Article VII of the March 14, 1962, document not to "commence . . . any lawsuit concerning any affairs of Bata-Best," and his recognition in Article IV of that same document that he owned only 45% of Bata-Best.[11]

Appellee's petition for further enforcement also described how appellant, acting through his counsel in the Netherlands, asserted in a series of letters commencing on October 5, 1965, that the comprehensive settlement agreement was invalid and that he was the rightful owner of 100% of the shares of Bata-Best. These claims were also in direct contradiction of appellant's stipulation in Article IV of the March 14, 1962, agreement, that he owned only 45% of the Bata-Best shares.

Finally, appellee's petition for further enforcement described appellant's vote at the November 29, 1968, general meeting of the shareholders of Bata-Best against the capitalization of the earned surplus of Bata-Best. Appellant held 45% of the shares of Bata-Best, and under the by-laws of that company an increase in the authorized capital could only be effected by a two-thirds vote of the outstanding shares. Appellant's vote was in direct violation of his undertaking in Article IV of the March 14, 1962, agreement to cooperate in effectuating the capitalization of the earned surplus of Bata-Best.

On June 25 through June 27, 1969, the trial court held hearings to receive evidence with respect to appellee's

[10] See trial court's Opinion Sur Plaintiff's Motion for Summary Judgment, October 5, 1971.

[11] See text at pages 3-4, supra.

petition for further enforcement. At these same hearings the trial court also received evidence in support of an application for the assessment of damages which appellee had filed. In this application, appellee specified the injuries which he had suffered as a result of appellant's breaches of the settlement agreement and his contempt of the Final Decree.

On February 3, 1970, the trial court issued the decree which is the subject of appellant's appeal at No. 491 January Term, 1970. This decree had three main aspects. First, the decree dismissed appellee's petition for further enforcement. The court noted:

> "This court has heard enough testimony to be convinced that this defendant has no genuine intention of ever terminating litigation with the plaintiff in one form or another in all the courts of the world, and probably never had any such intention even at the moment of executing the March 1962 agreement designed for that purpose. At the very most, what can be conceded the defendant Bata is a willingness to end the contest only at some point in the distant future when plaintiff delivers up some mythical number of millions in money or property, until which time any solemn agreement or any court's decree is but a way station, or one lost battle to be disregarded as a momentary check, on the path toward final and victorious confrontation. . . .
>
> ". . . With the most extreme reluctance, nevertheless, the court is compelled to conclude that the present proceeding cannot be permitted the scope sought for by the plaintiff."

In dismissing appellee's petition for further enforcement the trial court found that appellee's original complaint had alleged only two specific breaches of the 1962

settlement agreement—failure to cooperate in terminating the English litigation and failure to cooperate in registering the Bata-Best shares. However, the court found, appellee's petition for further enforcement alleged additional breaches—revival of the Swiss litigation, claims to ownership of 100% of Bata-Best, and failure to cooperate to capitalize the Bata-Best surplus. Since the original complaint "in neither pleadings nor prayer, had been framed to include those [additional] alleged wrongful acts of defendant Bata within its scope,"[12] the trial court concluded that appellee's request for further enforcement could not be granted.

The second aspect of the trial court's February 3, 1970, decree was its remission of $200,000 of the $250,000 in fines for civil contempt that it had imposed upon appellant. The court noted:

> "The testimony is quite clear and convincing that defendant did nothing to bring about termination of the litigation in England, but that he did at length cooperate in effecting registration of the bearer shares of the Dutch Bata company. The court is informed that the effective date of such registration was November 9, 1968. Defendant Bata, on this showing, has complied with a half-portion of the court's order, and has ignored the remainder. The termination of the English litigation was effected by plaintiff alone in an extremely roundabout and burdensome fashion. The fine imposed upon defendant Bata is remitted to the extent of $200,000; the remaining portion of the fine stands."

The court directed Central-Penn to pay the unremitted fine of $50,000 from the escrow to the Commonwealth of Pennsylvania.

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12 See trial court's Opinion Sur Plaintiff's Motion for Summary Judgment, October 5, 1971.

The third and final aspect of the trial court's February 3, 1970, decree was its award to appellee of $260,361.85 in compensatory damages. These damages were awarded to compensate appellee for the injuries he suffered between April 17, 1967 (the date the United States Supreme Court denied certiorari to review this Court's decision in *Bata I* affirming the Final Decree), and June 25, 1969 (the date of the hearings on appellee's application for the assessment of damages), as a result of appellant's failure, in direct contempt of the Final Decree, to cooperate in terminating the English litigation and in registering the Bata-Best shares. These damages were based upon the following expenses and losses incurred by appellee and established at the June 25 to 27, 1969, hearings.

(1.) $202,950.26 for services of New York and Philadelphia counsel for enforcement of the Final Decree;

(2.) $47,813.55 for services of English counsel for termination of the English litigation without defendant's cooperation;

(3.) $9,598.04 in interest on cash dividends wrongfully kept from appellee by the English litigation.

The court directed Central-Penn to pay the $260,361.85 in damages to appellee from the escrow.

E. Appellee's Motion to Amend His Pleadings and the Trial Court's Supplementary Decree of October 5, 1971

In light of the trial court's decree of February 3, 1970, appellee sought permission to amend his complaint. On March 12, 1970, after a hearing, appellee's motion to amend was granted. Appellee amended his complaint to include specific allegations of the three additional breaches

of the settlement agreement—revival of the Swiss litigation, claims to ownership of 100% of Bata-Best, and failure to capitalize the Bata-Best surplus—which the trial court had felt unable to remedy on the state of the original pleadings.

After appellee had filed his amended pleadings, and in fact after appellant had filed an answer with new matter and a counterclaim to appellee's amended complaint and appellee had replied, appellant appealed to this Court from the trial court's February 3, 1970, decree. On January 26, 1971, this Court issued an order retaining the appeal but remanding the case to the trial court for an expeditious decision of "all . . . pending issues which had not been disposed of by agreement of the parties or by the lower Court."

In obedience to this Court's order the trial court held a hearing to receive additional testimony in relation to appellee's motion for summary judgment on the amended complaint. This motion had been filed by appellee on May 26, 1970, during the time that appellant's appeal from the trial court's order of February 3, 1970, was pending in this Court.

On October 5, 1971, the trial court issued the supplementary decree which is the subject of appellant's appeal at No. 135 January Term, 1972. This decree granted appellee's motion for summary judgment on his amended complaint and ordered appellant to refrain from attempting to reopen the Swiss litigation, to refrain from making any claims to ownership of 100% of Bata-Best, and to procure the vote of his 45% holding in Bata-Best in favor of the capitalization of that company's surplus. The supplementary decree also ordered appellant to refrain from asserting the invalidity of the comprehensive settlement agreement in any action in any court of any nation.

In addition, the trial court's October 5, 1971, decree awarded appellee an additional $507,954.86 in damages.

The court held:

> "As the direct result of the defendant Bata's advancing such claims, instituting or reviving litigation, and failure or refusal to perform the terms of the March 27, 1962 comprehensive settlement agreement, plaintiff has been caused to suffer damages, including counsel fees, costs and disbursements, in the amount of $507,954.86."

These damages consisted specifically of the following expenses incurred by appellee:

(1) fees and disbursements of New York and Philadelphia counsel from January 1, 1963, to April 17, 1967 ($283,737.85)—these fees and disbursements were necessitated by (a) appellee's efforts, from January 1, 1963, to April 17, 1967, to remedy appellant's refusal, in violation of the settlement agreement, to cooperate in terminating the English litigation and in registering the Bata-Best shares, and (b) appellee's efforts, from October 1965 to April 17, 1967, to remedy appellant's attempts to revise the Swiss litigation, claims to 100% ownership of Bata-Best, and refusal to cooperate in capitalization of the Bata-Best surplus;

(2) fees for Swiss counsel from October 1965 to December 1968 to defend against appellant's attempts, in violation of the settlement agreement, to reopen the Swiss litigation ($134,567.57); and (3) fees and disbursements of New York and Philadelphia counsel from June 25, 1969, to May 18, 1971, to remedy appellant's attempts to reopen the Swiss litigation, claims to ownership of 100% of Bata-Best, and refusal to capitalize the Bata-Best surplus, all in violation of the comprehensive settlement agreement ($89,649.44).

Appellant's appeal from this October 5, 1971, decree of the trial court was consolidated with his earlier appeal from the February 3, 1970, decree of the trial court.

II

We shall first deal with the allegations of error raised by appellant in his appeal, at No. 491 January Term, 1970, from the February 3, 1970, order of the trial court.

Appellant concedes, as he must in light of this Court's previous holdings, that:

> "It is well settled . . . that the court may, in a proceeding for civil contempt, impose the remedial punishment of a fine payable to an aggreived litigant as compensation for the special damages he may have sustained by reason of the contumacious conduct of the offender."

Brocker v. *Brocker,* 429 Pa. 513, 520, 241 A. 2d 336, 339 (1968) (quoting from *Parker* v. *United States,* 126 F. 2d 370, 380 (1st Cir. 1942).[13]

However, appellant contends that by our decision in *Bata II* this Court limited appellee's right to recover for the damages caused by appellant's contumacious conduct to recovery of the sum of $50,000. This contention must be rejected.

[13] It is also well-settled that attorneys' fees and disbursements necessitated by another party's civil contempt are among the special damages for which recovery may be had. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 718 87 S. Ct. 1404, 1407 (1967); *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U.S. 399, 426-28, 43 S. Ct. 458, 465-66 (1923); *Lance* v. *Plummer,* 353 F. 2d 585, 592 (5th Cir. 1965); *In re Federal Facilities Realty Trust,* 227 F. 2d 657, 658 (7th Cir. 1955); *West Texas Utilities Co., Inc.* v. *N.L.R.B.,* 206 F. 2d 442, 448-49 (D. C. Cir. 1953); *Backo* v. *Local 281, United Brotherhood of Carpenters and Joiners of America,* 308 F. Sup. 172 (N.D.N.Y. 1969); *Babee-Tenda Corp.* v. *Scharco Mfg. Co.,* 156 F. Supp. 582, 587 (S.D.N.Y. 1957); *Thomas* v. *Woollen, Ind.* , , 266 N.E. 2d 20, 22 (1971); *Grunberg* v. *Louison,* Mass. , , 180 N.E. 2d 802, 806 (1962); Note, Procedures for Trying Contempts in the Federal Courts, 73 Harv. L. Rev. 353, 354 n. 8 (1959); see generally, Annotation 55 A.L.R. 2d 979; contra, *Jaikens* v. *Jaikens,* 12 Mich. App. 115, , 162 N.W. 2d 325, 329-30 (1968). Appellant does not dispute this proposition.

Only five members of this Court participated in the decision of *Bata II*. Four members voted to affirm the trial court's imposition of $250,000 in conditional fines for contempt, and one Justice, the late Justice Cohen, dissented without an opinion. Of the four Justices who voted to affirm, only two indicated that they would limit appellee's right to recover for the damages caused by appellant's contempt of the Final Decree of $50,000. Certainly Justice Cohen's dissent cannot be regarded as expressing any view on the question of whether appellee's right to recover for damages should be limited. Thus our *Bata II* opinion was in fact an affirmance, by an evenly-divided vote of two to two, of the trial court's holding that there would be no arbitrary limitation on appellee's right to recover for the damages occasioned by appellant's contempt of the Final Decree.

In addition, there is absolutely no authority or reason for imposing such an arbitrary limitation on an injured party's right to recover for the damages caused by the contumacious conduct of another party.[14] Such an arbitrary limitation would enable one litigant acting in contempt of a court order, to coerce his opponent into unjustified monetary or property concession by capitalizing on his opponent's desire to avoid legal expenses and other damages for which he could not be compensated. In fact, appellant's actions throughout the course of the litigation in the courts of this Commonwealth have apparently been motivated by a strategy of precisely this sort.[15] In light of appellant's deliberate and continuous course of conduct, it would be manifestly unfair to deny appellee the right to recover any more than $50,000 when he has proven that the damages that he suffered as a result of ap-

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[14] Cf. The constitution of this Commonwealth prohibits the General Assembly from limiting "the amount to be recovered . . . for injuries to persons or property . . ." Constitution of Pennsylvania, Art. 3, § 22.

[15] See text at pages 10-11, supra.

pellant's contumacious conduct were more than five times that amount.

Appellant's next contention is that appellee is not entitled to recover for the costs he incurred in terminating the English action. Appellant bases his contention on the fact that in the 1962 settlement agreement appellee agreed to pay the costs of entering the "Tomlin Order" which was necessary to terminate the English action.

This contention must be rejected. Appellee's agreement to pay the costs of obtaining the "Tomlin Order" was clearly premised upon his justifiable expectation that appellant would abide by his promise to cooperate in terminating the English action. However, as we have noted previously,[16] appellant stubbornly refused to cooperate, and the termination of the English litigation was effected by appellee alone in what the trial court accurately characterized as "an extremely roundabout and burdensome fashion." Appellee's agreement to pay the nominal expenses which would have been required to terminate the English litigation with appellant's cooperation cannot be construed as a waiver of his right to damages for the extraordinary expenses which appellee was obliged to incur as a result of appellant's contemptuous refusal to cooperate.

Appellant also contends that the trial court's order of February 3, 1970, erroneously directed that Central-Penn pay $50,000 out of the escrow fund to the Commonwealth of Pennsylvania. More specifically, appellant alleges that this fine constituted a penalty for indirect criminal contempt, and that therefore he was entitled to a jury trial before he could be adjudged to have committed contempt. See Act of June 23, 1931, P.L. 925, § 1, 17 P.S. § 2047; *Bloom v. Illinois*, 391 U.S. 194, 88 S. Ct. 1477 (1968). Appellant's contention is totally without merit, for he was held in civil, not criminal, contempt.

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16 See text at pages 7-8, supra.

By its orders of August 10, 1967, and November 17, 1967, the trial court held appellant to be in civil contempt for his failure to carry out the Final Decree.[17] In these orders the court imposed total fines upon appellant of $250,000 in order to obtain appellant's compliance with the terms of the Final Decree. In levying the fines the court noted: "(I)n the event of defendant's (appellant's) ultimate compliance with the decree he may apply for remission of the fines imposed against him subject to plaintiff's (appellee's) right of damages including all expenses and attorneys' fees."

On appeal this Court in *Bata II* held that the fines were "completely within the court's discretion,"[18] and we specifically denied appellant's claim that he was entitled to a jury trial before the fines could be imposed.[19] We pointed out that the purpose of the fines was remedial—to obtain or to coerce appellant's compliance with the Final Decree[20]—rather than punitive, and concluded that the proceedings were therefore ones for civil contempt, not criminal contempt.[21] Of course there is no right to a jury trial in proceedings for civil contempt.[22]

In its order of February 3, 1970, the trial court did not impose any new fines upon appellant. Rather the trial court remitted $200,000 of the $250,000 in fines that it had

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17 See text at pages 7-8, supra.

18 433 Pa. at 289, 249 A. 2d at 769.

19 Id. at 289-90, 249 A. 2d at 769.

20 Id. at 287-88, 249 A. 2d at 768-69.

21 Id. at 289, 249 A. 2d at 769.

In *Brocker* v. *Brocker*, 429 Pa. 513, 521, 241 A. 2d 336, 339 (1968), this Court, quoting from the United States Supreme Court's decision in *United States* v. *United Mineworkers of America*, 330 U.S. 258, 303-04, 67 S. Ct. 677, 701 (1947), explained the purposes of civil contempt proceedings: "Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." (Emphasis omitted.)

For discussion of the distinction between civil and criminal contempt see *Shillitani* v. *United States*, 384 U.S. 364, 368-70, 86 S. Ct. 1531, 1534-35 (1966); Note, Procedures for Trying Contempt in the Federal Courts, 73 Harv. L. Rev. 353, 353-54 (1959).

22 *Cheff* v. *Schnackenberg*, 384 U.S. 373, 377, 86 S. Ct. 1523, 1524 (1966); *Schillitani* v. *United States*, 384 U.S. 364, 365, 86 S. Ct. 1531, 1533 (1966).

already imposed upon appellant and held that the remaining $50,000 in fines would stand. As we held in *Bata II*, the $250,000 in fines for civil contempt were properly imposed by the trial court sitting without a jury.[33] We cannot accept appellant's contention that all of those fines must be remitted unless a jury redetermines the trial court's previous adjudication that appellant was in contempt of the Final Decree.

Finally, appellant contends in his appeal from the February 3, 1970, decree that the trial court had no authority to direct that the $50,000 fine and the $260,000 in damages be paid out of the escrow fund. Appellant argues that a court may not reach an asset of an estate in order to coerce the obedience of the estate's representative to a court order or to compensate a party injured by the contumacious conduct of the representative of that estate. Appellant's contention is clearly without merit.

It is a bedrock principle of the law of agency that an agent or servant acting within the general scope of his authority can subject his principal to liability.[34] When, as here, the duly authorized representative of an estate has refused to comply with a court order, we see no reason why the court cannot exact penalties to coerce obedience with its order on either the representative individually or on the estate, or on both the estate and the representative. By the same token, when, as here, the contumacious conduct of the representative of an estate has damaged an individual, we see no reason why that individual cannot look to the assets of the estate as well as to the personal assets of the representative for satisfaction.

In an analogous setting the Restatement (Second) of Trusts, in addition to subjecting a trustee to personal liability to third persons on obligations incurred in the administration of a trust,[35] provides in Section 271A:

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[33] *Bata II* at 239-90, 249 A. 2d at 769.

[34] See, e.g., Restatement (Second) of Agency §§ 140-267.

[35] Restatement (Second) of Trusts § 261.

"A person to whom the trustee has incurred a liability in the course of the administration of the trust may be permitted to obtain satisfaction of his claim out of the trust estate if it is equitable to permit him to do so. . . ."

The official Comment to the above-quoted section of the Restatement describes Section 271A as embodying the "modern trend." The Comment explains:

"It has gradually become established that a person to whom the trustee has incurred a liability in the course of the administration of the trust may reach the trust estate for satisfaction of his claim. . . .

"It is coming to be recognized that just as an agent or servant acting within the general scope of his authority within the general scope of his authority can subject the trust estate, although not the beneficiaries personally, to liability. . . .

"Under this principle the creditor is given a direct claim against the trust estate, enforceable by an action against the trustee in his representative capacity. It is immaterial whether the trustee has committed a breach of trust as a result of which he is indebted to the trust estate."[36]

In another analogous situation, the courts of this Commonwealth and of other jurisdictions have on numerous occasions imposed fines upon the assets of corporations or unions for the contumacious conduct of corporate agents or union members.[37]

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[36] See III Scott, The Law of Trusts §§ 268-271 A. 3 (3rd ed. 1967).

[37] See e.g., *Milk Control Commission* v. *McAllister Dairy Farms*, 354 Pa. 459, 121 A. 2d 144 (1956); *Scranton* v. *Peoples Coal Co.*, 274 Pa. 63, 117 Atl. 673 (1922); *United States* v. *United Mineworkers of America*, 330 U.S. 258, 67 S. Ct. 677 (1947); *In re Holland Furnace Co.*, 241 F. 2d 243 (7th Cir. 1965); *Singer Manufacturing Co.* v. *Sun Vacuum Stores, Inc.*, 191 F. Supp. 738 (D.N.J. 1961); *United States* v. *Brotherhood of Railroad Trainmen*, 16 F. Supp. 1019 (D.D.C. 1961); *State* v. *Local Union 6780, United Steelworkers of America*, 173 Ohio St. 75, 179 N.E. 2d 331 (1961); see *Butler County* v. *Pittsburgh, Harmony, Butler & Newcastle Ry. Co.*, 296 Pa. 347, 351, 146 Atl. 104, 104-06 (1929); see generally 17 Am. Jur. 2d Contempt § 12; 17 C.J.S. Contempt § 24.

Finally, it should be noted that the escrow fund was established for the express purpose of guaranteeing the performance of appellant's contractual agreements to cooperate in terminating the English action and in registering the Bata-Best bearer shares.[18] Since appellant's contempt consisted of a refusal to carry out court orders to perform the very agreements that the escrow fund was designed to secure, we believe that it was not only proper but particularly appropriate in this case for the trial court to assess the fine and damages upon the escrow fund.

III

The essence of the appellant's argument in his appeal at No. 135 January Term, 1972 is that the trial court erred when it permitted appellee to amend his complaint and thereby provide the basis for the additional relief which the court granted in its October 5, 1971, supplementary decree.[19] We believe that the trial court's allowance of the amendment was entirely proper.

This court has frequently held that amendments to pleadings "should be liberally granted at any stage of the proceedings." *Wilson* v. *Howard Johnson Restaurant*, 421 Pa. 455, 460, 219 A. 2d 676, 679 (1966) (quoting from *Schaffer* v. *Larzelere*, 410 Pa. 402, 407, 189 A. 2d 267, 270 (1963). This liberality is in accord with the general objective of our procedural rules. Rule 126 of the Pennsylvania Rules of Civil Procedure provides:

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[18] See text at page 4, supra.

[19] Although appellant does not question the propriety of the trial court's award of damages to compensate appellee for the counsel fees and disbursements accumulated by appellant's numerous breaches of the settlement agreement, we note that the United States Supreme Court has held that "allowance of counsel fees and other expenses entailed by litigation . . . 'is part of the historic equity jurisdiction of the federal courts.'" *Vaughn* v. *Atkinson*, 369 U.S. 527, 530, 82 S. Ct. 997, 999 (1962) (quoting from *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 164, 59 S. Ct. 777, 779 (1939) (Frankfurter, J.)). The Supreme Court has indicated that counsel fees and other expenses entailed by litigation are to be awarded "when overriding considerations of justice . . . compel such a result." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718, 87 S. Ct. 1404, 1407 (1967). This is certainly such a case.

"The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties."

Despite our liberal policy of allowing amendments to pleadings, an amendment will not be permitted if it would result in undue prejudice to the pleader's opponent.[31] Professor Fleming James, Jr. of Yale Law School has given an accurate and succinct description of the concept of prejudice in this context:

> "All amendments have this in common: they are offered *later in time* than the pleading which they seek to amend. If the amendment contains allegations which would have been allowed inclusion in the original pleading (the usual case), then the question of prejudice is presented by the *time* at which it is offered rather than by the substance of what is offered. The possible prejudice, in other words, must stem from the fact that the new allegations are offered *late* rather than in the original pleading, and not from the fact that the opponent may lose his case on the merits if the pleading is allowed. . . ."[32]

Nor will an amendment be permitted which would undermine the valid policies embodied in the statutes

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30 *See Kilian* v. *Allegheny County Distributors*, 409 Pa. 344, 347, 185 A. 2d 517, 519 (1962); *Esso Standard Oil* v. *Taylor*, 399 Pa. 324, 330, 159 A. 2d 692, 695-96 (1960); *Miners Savings Bank* v. *Naylor*, 342 Pa. 273, 279, 20 A. 2d 287, 291 (1941).

31 *Wilson* v. *Howard Johnson Restaurant*, 421 Pa. 455, 460, 219 A. 2d 676, 679 (1966); *Schaffer* v. *Larzelere*, 410 Pa. 402, 407, 189 A. 2d 267, 270 (1963); *Kilian* v. *Allegheny County Distributors*, 409 Pa. 344, 347, 185 A. 2d 517, 519 (1962); *Esso Standard Oil Co.* v. *Taylor*, 399 Pa. 324, 330, 159 A. 2d 692, 695-96 (1960); *Miners Savings Bank* v. *Naylor*, 342 Pa. 273, 279, 20 A. 2d 287, 291 (1941).

32 Fleming James, Jr., Civil Procedure 158 (1965).

of limitation. Thus while Rule 1033 provides that an amended pleading "may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action," this Court has consistently held that an amendment introducing a new cause of action will not be permitted after the statute of limitations on the new cause of action has expired.[23]

Applying these principles to the instant case, it is clear that appellee's amendment was properly allowed. Appellant suffered no prejudice as a result of appellee's amendment—he had ample time to prepare to refute the allegations which appellant introduced by way of amendment. In addition, allowance of appellee's amendment in no way undermined any of the policies sought to be advanced by the statute of limitations. Each of the three additional breaches of the settlement agreement introduced by appellee's amendment to his complaint occurred after October 1, 1965,[24] and thus were well within the six year statute of limitations period for contract actions[25] when appellee's amended complaint was filed on March 16, 1970.

Moreover, we believe that the interests of judicial efficiency and economy clearly called for the trial court to permit appellee's amendment. Prior to his amendment, appellee had already introduced an immense quantity of evidence concerning the three additional breaches in his petition for further enforcement of the Final Decree[26] and at the June 1969 hearings on that petition. For the trial court to have refused appellee's amendment and required

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[23] *Wilson* v. *Howard Johnson Restaurant*, 421 Pa. 455, 461, 219 A. 2d 676, 679 (1966); *Schaffer* v. *Larrabee*, 410 Pa. 402, 407, 189 A. 2d 267, 270 (1963); *Arner* v. *Sokol*, 373 Pa. 587, 592, 96 A. 2d 854, 856 (1953); *Shenandoah Borough* v. *Philadelphia*, 367 Pa. 180, 192, 79 A. 2d 433, 438 (1951).

[24] See text at pages 8-10, supra.

[25] Act of March 27, 1713, 1 Sm.L. 76, § 1. 12 P.S. § 31. See *Dixon Estate*, 426 Pa. 561, 562, 233 A. 2d 242, 244 (1967); P.L.E. Limitation of Actions, §§ 24, 54.

[26] See text at pages 8-10, supra.

him to bring a separate action to remedy the three additional breaches would have occasioned a serious and unnecessary expenditure of the time and resources of the courts of this Commonwealth.

The trial court's decree of February 3, 1970, and the supplementary decree of October 5, 1971 are affirmed. Appellant to bear costs.

Mr. Justice Eagen filed a concurring and dissenting opinion.

Mr. Justice Manderino concurs in the result.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

THOMAS J. BATA,
Appellee,

v.

CENTRAL-PENN NATIONAL BANK
OF PHILADELPHIA
Appellee,

and

JAN T. BATA, INDIVIDUALLY AND
AS REPRESENTATIVE OF JAN A. BATA,
deceased Appellant

No. 491 January Term, 1970

No. 135 January Term, 1972

Appeal No. 491 from the Decree of
the Court of Common Pleas No. 3
of Philadelphia, At No. 2495 June
Term 1962

Appeal No. 135 from the Supplementary
Decree of the Court of Common Pleas
No. 3 of Philadelphia to No. 2495
June Term 1963

CONCURRING AND DISSENTING OPINION

EAGEN, J. Filed: June 28, 1972

I concur in the affirmance of the trial court's decree of February 3, 1970 (appeal No. 491 January Term 1970). However, I would reverse the supplementary decree of the trial court entered on October 5, 1971, and, hence, I dissent from the Majority's ruling in Appeal No. 135 January Term, 1972.

Opinion of February 3, 1970 Sur Petition for Enforcement

THOMAS J. BATA

v.

CENTRAL-PENN NATIONAL BANK
OF PHILADELPHIA, AND
JAN A. BATA

C. P. NO. 3
JUNE TERM, 1963
No. 2495

OPINION SUR PLAINTIFF'S PETITION FOR FURTHER ENFORCEMENT OF DECREE, ASSESSMENT OF DAMAGES AND ORDER THEREON

REIMEL, J.
SMITH, J.

Orders entered by this court on June 20, August 10 and August 21, 1967, held defendant Jan T. Bata in civil contempt for his failure to carry out the terms of a final decree handed down October 18, 1965. Combined fines of $250,000 were imposed with the condition that the defendant might apply for remission in the event of his ultimate compliance with the decree, and with the corresponding provision in plaintiff's favor of a right to claim damages, including all expenses and attorneys' fees.

These orders were affirmed by the Supreme Court of Pennsylvania (433 Pa. 284) on February 10, 1969, and the record was remanded to this court for "proceedings consistent with the views expressed in this opinion (of the Supreme Court) and the opinion of the court below."

The plaintiff on March 25, 1969, filed a "Petition for Further Enforcement of the Final Decree of October 18, 1965" on which the court granted a rule to show cause. Defendant Bata met this petition with preliminary objections, which the court promptly dismissed. Thereupon,

under date of April 7, 1969, the defendant Bata filed an answer to the merits, but at the same time pursued an appeal forthwith to the Supreme Court under the Act of March 5, 1925, P.L. 23, 12 P.S. 672, challenging the procedure on jurisdictional grounds, the point raised by the preliminary objections dismissed by the court. The Supreme Court quashed this appeal on May 6, 1969. The matter then proceeded to several extended hearings on the petition and answer.

The averments of the petition, in 31 paragraphs, and the burden of the lengthly testimony offered in support of them, have to do only in lesser degree with the defendant Bata's compliance or noncompliance with the decree of October 18, 1965, and in far greater measure with his many alleged acts of breach of the terms of the March 1962 comprehensive settlement agreement entered into with the avowed object of terminating on a worldwide basis the several decades of litigation carried on between these parties. Not only in effect, but in express terms, the plaintiff's petition for further enforcement of the decree of October 18, 1965, asks this court to hand down a new decree ordering the defendant to perform three affirmative steps, one in Switzerland, and two in Holland, viz.:

—In Switzerland, to issue instructions to his counsel there to terminate certain litigation there pending;

—In Holland, to vote the shares of the Dutch Bata corporation owned by him in favor of increasing the authorized capital of the company;

—Also in Holland, through his counsel there, to withdraw certain written claims made by him in stockholders meetings of that company to the sole ownership of its entire stock.

These are steps not at all required by the October 18, 1965, decree, or considered in the proceedings leading up

to that decree. Further, the present petition asks the court to enjoin the defendant Bata from any action in those two jurisdictions, Switzerland and Holland, or anywhere else which would constitute a violation of the comprehensive settlement agreement of 1962.

The plaintiff in framing such a petition and in seeking such relief is bringing before the court conduct of the defendant committed during the course of the instant litigation, long after the complaint was filed in this action, and even after the judgment entered and the decree handed down which we are called upon to enforce. Further, the court is presently asked by the plaintiff to undertake enforcement of the entire agreement of 1962 in all its terms.

This court has heard enough testimony to be convinced that this defendant has no genuine intention of ever terminating litigation with the plaintiff in one forum or another in all the courts of the world, and probably never had any such intention even at the moment of executing the March 1962 agreement designed for that purpose. At the very most, what can be conceded the defendant Bata is a willingness to end the contest only at some point in the distant future when plaintiff delivers up some mythical number of millions in money or property, until which time any solemn agreement or any court's decree is but a way station, or one lost battle to be disregarded as a momentary check, on the path toward the final and victorious confrontation. This court finds it an affront delivered to its face to be offered both in sworn pleadings and in oral statements at the bar of the court as an explanation of a party's failure to comply with its decree that his conduct was dictated by his search for "ultimate justice and equity" as if this court's decree and orders, affirmed by the courts of last resort of this Commonwealth, and denied review by the highest court of the land, were neither ultimate, nor justice, nor equity.

With the most extreme reluctance, nevertheless, the court is compelled to conclude that the present proceeding cannot be permitted the scope sought for by the plaintiff. The subject matter of this action at its institution did not embrace the totality, or more than a small part, of the undertakings of the March 1962 agreement. The complaint in its paragraph Fifth specifically set forth that its object was to secure delivery to plaintiff of certain items of property in the hands of the escrow agent, Central-Penn National Bank. Violations of other terms of the 1962 agreement were not pleaded, and even if it were to be said they were justiciable under the concluding prayer for general relief, they were not made the subject of the September 9, 1965 judgment entered by this court on which the final decree was founded. To the extent Judge Alessandroni's opinion filed in support of the judgment then being entered declares the March 1962 agreement valid and binding, it does so only as finding it the foundation and justification of the relief then being asked, specific enforcement of the terms of the escrow and release of the particular items of property held in escrow. Indeed, we find part of Judge Alessandroni's second opinion, disposing of various motions filed after judgment and final decree, expressly directed to the question of a supposed breach of the comprehensive agreement alleged to have been committed by plaintiff in Brazil in August 1965. On that point, his opinion reads,

> "It may well be that defendant has a cause of action arising out of same, but not in this action. Any breach of the settlement agreement must stand on its own merits."

Further, the final decree this court is required to enforce does not in any respect include the actions plaintiff now wishes us to command defendant Bata to perform. Of defendant Bata that decree ordered two affirmative steps:

(1) Termination of litigation in the Chancery Division of the High Court of Justice, in England;

(2) The voting of his shares in the Dutch Bata company to effect registration of the bearer shares of that company.

The decree was entirely silent as to the affirmative steps in Switzerland and Holland, detailed above, which the plaintiff now would have us command. If the conduct on defendant's part in Switzerland and Holland which we are now asked to enjoin in the respects set forth above constitutes violation of the terms of the comprehensive settlement agreement, plaintiff's remedy is in some other action, separate and independent from this one:

> "Generally, it may be said that care should be exercised in preparing the demand for relief, since the final decree may not be broader than the several prayers and any amendments thereto, for in accord with the principles in relation to variance, no relief may be granted in equity which is not agreeable to the case made by the complaint and consistent with the relief specially prayed for. The relief granted should be consistent with the relief demanded." . . . 8 St. Pa. Prac. Sec. 154. *See: Shannon* v. *Early Foundry Co.*, 296 Pa. 141; *Ebur* v. *Alloy Metal Wire Co.*, 304 Pa. 177.

The plaintiff's demand for relief in this complaint on which the judgment of this court was entered did not encompass his present objectives, and the final decree being enforced was required to be framed accordingly, i.e., to provide the relief prayed for: *Christian* v. *Johnstown Police Pension Fund Assoc.*, 421 Pa. 240. Plaintiff's petition for further enforcement of decree is accordingly dismissed.

The measure of enforcement of the final decree presently to be determined by this court, therefore, is limited to two points:

(1) The proportion of the fine imposed by our orders of August 10 and November 10, 1967, now to be remitted on a showing of defendant's compliance with the final decree;

(2) The award to plaintiff of counsel fees and damages incurred through defendant's noncompliance.

(1) The testimony is quite clear and convincing that defendant did nothing to bring about termination of the litigation in England, but that he did at length cooperate in effecting registration of the bearer shares of the Dutch Bata company. The court is informed that the effective date of such registration was November 9, 1968. Defendant Bata, on this showing, has complied with a half-portion of the court's order, and has ignored the remainder. The termination of the English litigation was effected by plaintiff alone in an extremely roundabout and burdensome fashion. The fine imposed on defendant Bata is remitted to the extent of $200,000; the remaining portion of the fine stands.

(2) Plaintiff limits his claim for counsel fees and damages to the period from April 17, 1967, the date of denial of certiorari by the Supreme Court of the United States for review of the opinion of the Supreme Court of Pennsylvania (423 Pa. 373) affirming judgment in plaintiff's favor entered by this court, to the date of hearing. For this period, plaintiff satisfactorily proved that he incurred obligations to Sullivan & Cromwell, his New York counsel, and Drinker, Biddle & Reath, his Philadelphia counsel, for fees representing services rendered in enforcement of this court's decree in the total sum of $176,000, and for disbursements by these two law firms in the amount of $26,950.26. These two sums are, accordingly, awarded plaintiff.

Similar satisfactory proof was produced that plaintiff incurred expenses for the employment of English counsel for himself and other parties necessarily involved in the termination of the English litigation not carried out by defendant, totaling $47,813.55. Damages in this further amount are awarded plaintiff.

For the detention of the English Bata and the French Bata shares resulting from defendant's failure to terminate the English litigation, plaintiff seeks damages representing the difference in American dollar value of accumulated dividends not received by plaintiff prior to his own termination of proceedings there, caused by the October 1967 devaluation of the British pound sterling. We are cited no authority and have independently found none, holding that the measure of damages to be awarded for contempt of court should differ from the measure governing consequential damages in breach of contract, i.e., that the circumstances asserted as consequential to the breach, or contempt, should have been reasonably foreseeable, or within the contemplation of the parties at the time of the agreement in breach or the order treated with contempt. No testimony is offered that this event, devaluation of the British pound, was reasonably foreseeable or within the contemplation of the parties at either of these critical points in the present case, the execution of the March 1962 agreement, or the date of the court's order. Neither is any authority cited us wherein any court has taken any such vagary of international finance and economics into its determination of a measure of damages for breach of contract or contempt of court. It would seem further that the reduced amount of American dollar value flowing from the devaluation of the pound has the same purchasing power in Great Britain as the unreduced amount immediately preceding devaluation. This claim is denied.

Finally, plaintiff asserts a claim for damages for detention of the English and French shares tied up in the

English litigation calculated at interest at six per cent on the value of these shares for one year and eight days, the period between the date of denial of certiorari by the Supreme Court of the United States and the return to plaintiff of these shares in England by his own termination of the English litigation. We are cited no authority for adopting such a measure of damages for the detention of corporate stock shares. Plaintiff's authorities as cited all have to do with detention of personal property whose interim use or rental can be shown to have a value. This is not a case of final failure to obtain any delivery at all of shares of stock to which one is entitled, in which damages are the par value itself of the stock, plus dividends and interest (on the dividends): *Huntingdon and BTR Co.* v. *English*, 86 Pa. 247; *North* v. *Phillips*, 89 Pa. 250; *Appeal of Harris*, 12 A. 743, 9 Sadler 233, 21 W.N.C. 189, 13 Cent. 199. The proper measure of damages for withholding delivery of shares of stock is the excess, if any, of market over par value of the stock during the period of detention, plus dividends: *Bank of Montgomery* v. *Reese*, 26 Pa. 143. Plaintiff in this proceeding supplied no evidence as to difference between par and market value, and this factor vanishes from our computation.

Dividends accumulated in the amounts of $117,358 on the British shares, and of $39,146 on the French shares, while they were tied up in the English litigation were paid plaintiff upon his own termination of that litigation, but interest on those amounts for the period (one year, eight days) they were kept out of his hands, is a properly allowable item of damage. We accept plaintiff's calculation of that interest as follows:

1 year 8 days' interest on $117,358	$7,197.81
1 year 8 days' interest on 39,146	2,400.23
Total	$9,598.04

Accordingly, the court imposes on defendant Bata the unremitted remainder of the original fine, i.e., $50,000, and orders its payment to the Commonwealth of Pennsylvania.

Damages are awarded plaintiff as follows:

Counsel fees	$176,000.00
Disbursements by counsel	26,950.26
Expenses for employment of English counsel	47,813.55
Interest on dividends detained	9,598.04
Total	$260,361.85

The court, therefore, enters the following

ORDER

And Now, to wit, this 3rd day of February, 1970, plaintiff's petition for further enforcement of decree is dismissed, and the defendant, Central-Penn National Bank, escrow agent, is hereby ORDERED and DIRECTED, out of the escrow fund in its possession, to pay the following:

1. The unremitted fine in the sum of Fifty Thousand ($50,000.00) Dollars is to be paid to the Commonwealth of Pennsylvania;

2. The defendant, Central-Penn National Bank, as escrow agent, shall be paid its escrow costs and counsel fee in an amount to be agreed upon by the parties hereto. In the event of failure to agree, the said costs and counsel fee are to be determined by this court;

3. Damages in the sum of $260,361.85 are awarded to the plaintiff, Thomas J. Bata.

4. The balance remaining is awarded to the defendant, Jan T. Bata, representative of the estate of Jan A. Bata, deceased.

BY THE COURT

Rehmel,

J.

Smith,

J.

Opinion of October 5, 1971

THOMAS J. BATA v. CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, AND JAN A. BATA	C. P. No. 3 JUNE TERM, 1963 No. 2495

OPINION SUR PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

REIMEL, *J.*
SMITH, *J.*

Between the dates of this Court's previous decree of February 3, 1970 and of the defendant Bata's appeal therefrom, the plaintiff petitioned the Court for leave to amend his complaint. The purpose of his doing so was to enlarge his pleadings so as to assert and seek injunctive relief against conduct of the defendant Bata which he believed constituted breaches of their basic agreement of March 27, 1962. These very matters had been set forth in plaintiff's Petition for Further Enforcement which led up to our decree of February 3, 1970, but in issuing that decree we felt compelled to deny that additional relief because the original action, in neither pleadings nor prayer, had been framed to include those alleged wrongful acts of defendant Bata within its scope.

The leave to amend was duly granted, and extensive pleadings were newly filed on both sides. With the case in this posture, the Supreme Court of Pennsylvania when it came to consider the defendant Bata's appeal from the decree of February 3, 1970, in the interest of avoiding a piecemeal resolution of this longstanding and many-faceted controversy, entered this order:

> "AND Now, this 26th day of January, 1971, the Court has decided to retain this appeal, and it is

hereby Ordered that the case be remanded to the lower court for an expeditious decision of the issue in Item No. 2 of the Decree of February 3, 1970, and of all other pending issues which had not been disposed of by agreement of the parties or by the lower court. Upon disposition of this issue and of all other pending issues, the case will be relisted for oral argument at the April Session, at Philadelphia."

By stipulation of the parties, approved by the Supreme Court of Pennsylvania on March 17, 1971, the time of the relisting of the case for oral argument before the Supreme Court of Pennsylvania was fixed as the November, 1971 Session of that Court.

Item No. 2 of the decree of February 3, 1970 directed payment of escrow costs and counsel fee of the escrow agent defendant, Central-Penn National Bank, in an amount to be determined by agreement of the parties, or, failing that, by this Court's own calculation. That issue meanwhile has been resolved by agreement of the parties for payment by the escrow agent to itself out of the funds in its hands of the sum of $7,091.12.

The other pending issues referred to in the order which had not been disposed of by agreement of the parties or by this Court as of January 26, 1971 were the following:

a) Plaintiff's motion for summary judgment requesting a further and supplemental adjudication; and

b) the disposition of the balance of the funds remaining in escrow at the Central-Penn National Bank in light of this supplemental relief sought by plaintiff.

These issues were the one newly raised by plaintiff's amendment of his complaint pursuant to the leave granted him. The essential substance of the amendment is con-

tained in paragraph *Fifteenth* and the prayer of the amended complaint, as follows:

"*Fifteenth:* Defendant Jan T. Bata has wrongfully refused to carry out his remaining obligations under the comprehensive settlement agreement and has openly violated its terms in that he has laid claim to the majority interest in the Dutch Bata Company, Bata-Best; he has refused to vote his shares of Bata-Best for the capitalization of its accumulated surplus; and he has revived litigation in Switzerland directed at securing control of Bata-Best—all in violation of the comprehensive settlement agreement referred to in paragraphs 'Seventh' and 'Eighth'.

"*Sixteenth:* Plaintiff Thomas J. Bata has no adequate remedy at law.

"Wherefore, plaintiff prays the court to enter an order and decree: that defendant Jan T. Bata and his counsel, Harold E. Stassen take all steps necessary to complete performance of the comprehensive settlement agreement including specifically:

—to desist from any further litigation in Switzerland, Holland or elsewhere in violation of the comprehensive settlement agreement of March 1942;

—to give to defendant's Swiss counsel, Dr. von Castelberg, in writing, instructions to desist from any further litigation in Switzerland in violation of the comprehensive settlement agreement of March 1962;

—to pressure the retraction by defendant's Dutch counsel, Mr. Teixeira de Mattos, of his letter dated November 29, 1968 filed with the minutes of the general meeting of the Bata-Best of November 29, 1968 and of his partner's letter

dated June 9, 1969 filed with the minutes of the general meeting of Bata-Best of June 9, 1969; and in place thereof that he, Mr. Teixeira de Mattos, is to acknowledge by a writing suitable for filing with the minutes of a general meeting of Bata-Best that Leader AG is the owner of 55% of the capital stock of Bata-Best and that defendant has no claim to said 55% or interest therein whatsoever;

—to give defendant's Dutch counsel, Mr. Teixeira de Mattos, in writing, instructions to desist from any litigation in violation of the comprehensive settlement agreement of March 1962; and

—to procure the vote of the 45% of the capital stock of Bata-Best held by Jan A. Bata at his death in favor of any increase in the authorized capital of the company called for by the comprehensive settlement agreement of March 1962."

Following the filing by defendant Bata of his answer to the complaint so amended, together with new matter and counterclaims, and plaintiff's reply to the new matter and counterclaims, plaintiff on May 26, 1970 filed a motion for summary judgment. Accordingly, this motion was pending on the date of the Supreme Court's order of remand, January 26, 1971, and is, by that order, now to be ruled upon. Besides moving for summary judgment, plaintiff requested an award of damages, including counsel fees, costs and disbursements.

Since the entry by the Supreme Court of its order of January 26, 1971, this Court has held two further hearings on plaintiff's motion for summary judgment, on May 19, 1971 and June 15, 1971. At these hearings, plaintiff in support of his motion introduced the following evidence on the record: In paragraph 15 of plaintiff's amended complaint plaintiff asserts in part that defend-

ant, in violation of the 1962 settlement agreement, has laid claim to the majority interest in the Dutch Bata-Best Company, Bata-Best. Defendant in paragraph 15 of his April 3, 1970, answer to plaintiff's amended complaint does not specifically deny plaintiff's assertion. The record of the 1966 proceedings between plaintiff and defendant (Exhibit 36 to plaintiff's reply, admitted in paragraph 84 of defendant's counter reply, R(1966), pp. 249A-251A, 593A) reveals that it was agreed in the 1962 comprehensive settlement agreement that 275 of the 300 outstanding shares of Bata-Best were the property of Leader AG, a Swiss holding company, and 225 shares were the property of Jan A. Bata. That agreement further set forth that Jan A. Bata had "no legal or beneficial interest whatever in Leader AG or in its assets"; that as owner of the minority interest in Bata-Best, Jan A. Bata would "agree with, and ratify, all steps taken by Leader AG and/or Bata-Best to secure the release of any influence or control of the Government of the Netherlands . . . or the management or other affairs of Bata-Best, and that "a general meeting of shareholders (of Bata-Best would) be held at the earliest feasible date". (Exhibits 36 and 59 to plaintiff's reply, admitted in paragraph 84 of defendant's counter-reply, R(1966) pp. 249A-251A, 459A, 593A).

Plaintiff asserts defendant, in violation of the 1962 settlement agreement has written a series of letters to Bata-Best asserting that the provisions of the 1962 comprehensive settlement agreement, relating to the division of ownership of Bata-Best were invalid and that defendant is the owner of 100% of its outstanding shares, (paragraphs 17, 19, 20, 21, 22, 23, 24 of plaintiff's March 25, 1969 petition for further enforcement of the final decree of October 18, 1965).

Defendant did not specifically deny these alleged facts in his answer to plaintiff's petition for further enforcement (April 7, 1969, paragraphs 17, 19, 20, 21, 22, 23, 24).

During the June 1969 hearings plaintiff on June 25, 1969, introduced Exhibits P-2, 2A, through P-15, 15A inclusive, to substantiate his claim. (June 25th N.T. pp. 88-91, 117-128).

The record shows clearly that a valid settlement was entered into by the parties, that a division of the stock of the Bata-Best Company was concluded and that defendant has not abided by this settlement and now claims a total interest in Bata-Best. Sufficient evidence exists for an order directing defendant to cease the Dutch litigation surrounding the percent control of the Bata-Best stock and to abide by the division he agreed to in 1962.

Plaintiff, in addition, in Paragraph 15 of his amended complaint, now asserts, in part, that defendant in violation of the 1962 comprehensive settlement agreement has revived litigation in Switzerland directed at securing control of Bata-Best.

Defendant in his answer 15-C to plaintiff's amended complaint does not specifically deny that he has revived litigation. Instead he claims new evidence of fraud as grounds for the revival.

Also plaintiff in paragraphs 10, 15 and 18 of its 1969 petition for further enforcement charged defendant with instituting the Swiss litigation in violation of 1962 settlement.

Defendant in paragraphs 10, 15, 18 of his answer to plaintiff's petition for further enforcement does not specifically deny petitioner's claims.

As part of the 1962 settlement agreement defendant had agreed not to proceed with further litigation in Switzerland (Exhibit 22 to plaintiff's reply admitted by defendant in paragraph 84 of his counter-reply, R(1966) 196-A—207-A, 593-A; Exhibit 46 to plaintiff's reply admitted by defendant in paragraph 84 of his counter-reply, R(1966) 363-A, 593-A).

Exhibits P-16, 16-A through P-29 inclusive, substantiate petitioner's claim that defendant had revived

the litigation in Switzerland and were all admitted into evidence at the hearing on June 25, 1969 (N.T. pp. 92-100, 107-113).

Thus, the record again reveals a course of conduct objected to by the plaintiff and admitted to by the defendant. Said conduct contravenes a binding and complete agreement entered into by the parties in 1962. Plaintiff is entitled to relief from any further Swiss litigation grounded on defendant's allegations of fraud which are, as in the past, vague and unsupported.

Lastly, plaintiff in paragraph 15 of his amended complaint asserts in part, that defendant in violation of the 1962 comprehensive settlement agreement, has refused to vote his shares of Bata-Best for the capitalization of its accumulated surplus.

Defendant in paragraph 15-b of his answer to plaintiff's amended complaint does not specifically deny refusing to vote his shares of Bata-Best for the capitalization of its accumulated surplus. Instead, defendant claims that Dutch Bata has been recapitalized to the maximum permissible by its charter and that defendant never agreed to work with the plaintiff to amend the charter for the allowance of increased capitalization.

Plaintiff in support of its assertion cites (Exhibits 94, 95, 96, 100, 101, 102 to plaintiff's reply admitted by defendant in paragraphs 93 through 98 of defendant's counter-reply (R(1966) pp. 558-59A, 560-62A, 569A- 70A, 571A-72A, 573A-594A).

In addition, plaintiff previously asserted defendant's failure to capitalize in accordance with the 1962 settlement agreement in paragraphs 25, 26, 27, 28, 29, 30 of its 1969 petition for further enforcement.

Defendant did not specifically deny these allegations in paragraphs 25, 26, 27, 28, 29, 30 of its answer to plaintiff's petition for further enforcement.

Exhibits P-11, 11A, P-15, 15A inclusive substantiate petitioner's claim and were admitted into evidence at the hearing on June 25, 1969 (N.T. 122, 127-133).

Plaintiff upon a review of the record appears to be entitled to the additional relief it requests involving the capitalization of the surplus. Defendant agreed in 1962 to a harmonious and profitable operation of the Bata-Best Company and should be bound by the agreement he made. (Exhibit 82 to plaintiff's reply, admitted in paragraph 84 of defendant's counter-reply, R(1966) pp. 543A-545A, 593A).

The admissibility into evidence of all these portions of the present and earlier record of the case is controlled by the doctrine of judicial admissions.

Admissions contained in pleadings, stipulations, and the like are usually termed "judicial admissions", and as such cannot later be contradicted by the party who has made them.

> *Tops Apparel Mfg. Co., Inc.* v. *Bethman,* 430 Pa. 583, 244 A.2d 436; *Wills* v. *Kane,* 2 Grant 60, 63 (Pa. 1853).

Statements in a superseding pleading may be used as evidence against the party by whom they were made.

> *Eastern School Dist. to use* v. *Continental Casualty Co.,* 304 Pa. 67, 155 A.2d 93.

Though a pleading which has been withdrawn or stricken out or superseded by amendment is out of the case in its capacity as a pleading, and though the pleader is no longer concluded by it, statements therein may still be competent as admissions when relevant to issues in connection with which it is sought to introduce them.

> *Braceland* v. *Hughes, et us,* 184 Pa. Super. 4, 133 A.2d 286.

As added in 1966, the Rules of Civil Procedure provide for the procedure with respect to a motion for summary judgment (Rules of Civil Procedure, Rule 1035) which procedure was adopted from the federal rules.

Provision for a motion for summary judgment is made in the Rules of Civil Procedure relating to the action of assumpsit, and under rules conforming other forms of action to assumpsit, it would appear that a motion for summary judgment is available except as otherwise restricted by other rules in actions in equity, actions in trespass, and various other types of actions (Rules of Civil Procedures Rules 1035, 1501, 1041, 1121, 1141, 1061, 1071).

Under the Rules of Civil Procedures, after the pleadings are closed, but within such time as not to delay trial, any party may move for summary judgment on the pleadings, depositions, answers to interrogatories, admissions on file and supporting affidavits, if any (Rule 1035(A)).

A motion for summary judgment is designed to provide a speedy method for determining whether or not there is a question of fact, and, if no such question is present, to provide for the prompt determination of questions of law (Rule 1035).

One who is confronted with a sham pleading and who can conclusively show that it is a sham may move for a summary judgment. *Riche* v. *Kroger Co.*, 425 Pa. 213 (1967); *Com. ex rel. Allesandroni* v. *Applewald Borough*, 87 Dauph. 209 (1967) (where municipality admitted non-compliance with a lawful order by a board of Commonwealth and was unable to allege any facts which would excuse non-compliance, board was entitled to a summary judgment.)

Under the Rules of Civil Procedure, summary judgment may be granted only if the pleadings, depositions,

answers to interrogatories and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any matter of law (Rule 1035(A)). Thus, a summary judgment must be denied when there is a genuine issue of material fact, *Com.* v. *Strasburg Borough,* 45 D. & C. 2d 184 (1968); *Tath* v. *City of Philadelphia,* 213 Pa. Super. 282 (1968), and must be denied when, even though the facts are undisputed, the parties may in good faith disagree about inferences, *Schacter* v. *Albert,* 212 Pa. Super. 58 (1968).

The movant has the burden to demonstrate that there is no genuine issue of material fact, *McFadden* v. *American Oil Co.,* 215 Pa. Super. 44 (1969), and disputed or controverted facts, in order to preclude a summary judgment, must be relevant, *Linwood Harvestore, Inc.* v. *Common,* 427 Pa. 434 (1967).

However, even though there may be one or more issues of fact, resort may be had to summary judgment procedure to eliminate from the matters in issue, facts not seriously controverted (Rule 1035(C)) and resolve questions of law not arising from controverted facts.

In passing on a motion for summary judgment, it is not part of the court's function to decide issues of fact, but solely to determine whether there is an issue of fact to be tried. *McFadden* v. *American Oil Co.,* supra. *The Court must consider the entire setting of the case and all the papers in the record. Schacter* v. *Albert,* supra.

The record as potentially possible at trial should be considered; thus, even though counter affidavits are not filed, summary judgment should not be rendered on a party's affidavit which depends on oral testimony, since this testimony might be contradicted at the trial.

A careful review of the Bata record (pleadings and answers and affidavits offered into evidence) indicates no dispute that litigation was instituted in Washington, D. C., and in Switzerland, by defandant, that a clear

claim to total ownership in Bata-Best was made by defendant, and that there was no proper capitalization of the surplus of Bata-Best because of the intended intervention of defendant. Defendant's above described and specifically undenied conduct was in contravention of the clearly agreed to 1962 settlement agreement. Defendant's answers to plaintiff's petition for further enforcement cannot be characterized as specific denials. Defendant's answers are nothing short of inappropriate rationalizations. It would appear that in light of the Pennsylvania law on summary judgment that petitioner is entitled to this type of relief.

FINDINGS OF FACT

1. Since execution of the comprehensive settlement agreement of March 27, 1962, defendant Bata has, through his counsel, made written claims to the officers of the Dutch Bata-Best Company of his ownership of all the outstanding shares of that company.

2. Since execution of the comprehensive settlement agreement of March 27, 1962, defendant Bata has, through his counsel, instituted and maintained litigation in Holland seeking to assert his claim to ownership of all the outstanding shares of the Dutch Bata-Best Company.

3. Since execution of the comprehensive settlement agreement of March 27, 1962, defendant Bata has, through his counsel, revived litigation in Switzerland seeking therein to establish his own control of the Dutch Bata-Best Company and his claim to ownership of its stock in a proportion greater than that allocated to him in the aforesaid comprehensive settlement agreement.

4. Since execution of the comprehensive settlement agreement of March 27, 1962, defendant Bata has, either himself or through his counsel, failed and refused to procure the vote of his 45% of the shares of stock of the

Dutch Bata-Best Company in favor of that company's capitalization of its accumulated surplus.

5. As the direct result of the defendant Bata's advancing such claims, instituting or reviving litigation, and failure or refusal to perform the terms of the March 27, 1962 comprehensive settlement agreement, plaintiff has been caused to suffer damages, including counsel fees, costs and disbursements, in the amount of $507,954.86.

CONCLUSIONS OF LAW

1. The conduct of defendant Bata described in Findings of Fact Nos. 1, 2, 3 and 4 above constitutes violation on his part of the terms of the March 27, 1962 comprehensive settlement agreement heretofore adjudicated by this Court as valid and binding.

2. Plaintiff has no adequate remedy at law to enforce a cessation of such conduct, and compliance by defendant Bata with the terms of that settlement agreement, of which such conduct is violative.

3. Plaintiff is entitled to injunctive relief against such conduct.

4. Plaintiff is entitled to recovery from defendant Bata of damages consisting of his counsel fees, costs, and disbursements incurred in resistance to such conduct or in attempts to enforce defendant Bata's compliance with the terms of that settlement agreement.

SUPPLEMENTARY DECREE

NOW, to wit, this 5th day of October, 1971, plaintiff's motion for summary judgment is granted, and defendant Jan T. Bata, individually and as representative of the Estate of Jan A. Bata, Deceased, is ORDERED and DIRECTED:

1. Forthwith to discontinue, retract, and refrain from any claim or further claim advanced by himself

or any legal or other representative to any claim of ownership of the stock of the Dutch Bata-Best Company other than the 45% thereof set forth in the March 27, 1962 agreement of the parties.

2. Forthwith to issue written instructions to his Dutch counsel, Mr. Teixeira de Mattos, to make written retraction of his letter dated November 29, 1968, filed with the minutes of the general meeting of Bata-Best of November 29, 1968, and of his partner's letter dated June 9, 1969 filed with the minutes of the general meeting of Bata-Best of June 9, 1969; and in place thereof that he, Mr. Teixeira de Mattos, is to acknowledge by a writing suitable for filing with the minutes of a general meeting of Bata-Best that Leader AG is the owner of 55% of the capital stock of Bata-Best and that defendant has no claim to said 55% or interest therein whatsoever.

3. Forthwith to issue written instructions to his Dutch counsel, Mr. Teixeira de Mattos, to discontinue any pending and to institute no future litigation in the courts of that country seeking to assert a claim on behalf of defendant Jan A. Bata or defendant Jan T. Bata, individually or as representative of the Estate of Jan A. Bata, Deceased, to ownership of any more than 45% of the capital stock of the Dutch Bata-Best Company.

4. Forthwith to issue written instructions to his Swiss counsel, Dr. von Castelberg, to discontinue any pending and to institute no future litigation in the courts of that country seeking to assert a claim on behalf of Jan A. Bata, or his estate, or defendant Jan T. Bata, individually or as representative of the Estate of Jan A. Bata, Deceased, to control of the Dutch Bata-Best Company or to ownership of any more than 45% of the capital stock of that company.

5. To refrain himself or through any legal or other representative from any action in any court of any nation from asserting the invalidity of the comprehensive settlement agreement of March 27, 1962.

6. To procure the vote of his 45% of the shares of the capital stock of the Dutch Bata-Best Company at the next meeting of its stockholders called for such purpose, in favor of the capitalization of its surplus.

7. To pay the plaintiff the damages set forth above in Finding of Fact No. 5 in the amount of $507,954.86, additional to those awarded by this Court's decree of February 3, 1970.

AND, it is further ORDERED and DECREED that the escrow agent defendant, Central-Penn National Bank, after payment to itself of the sum agreed upon by the parties as to costs and counsel fees, $7,091.12, out of the escrow funds in its hands, and of the fine to be paid the Commonwealth of Pennsylvania and damages to plaintiff as already awarded by this Court's decree of February 3, 1970, apply any balance of said escrow fund to payment of the additional damages herein awarded by paragraph 7 of this decree.

October 5, 1971

BY THE COURT:

REHMEL
J.

SMITH
J.